No. 84-38

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

PEOPLE OF THE STATE OF ILLINOIS and PEOPLE OF THE STATE OF MICHIGAN, *Petitioners,*

v.

CITY OF MILWAUKEE, et al., *Respondents.*

PEOPLE OF THE STATE OF ILLINOIS and the METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, *Petitioners,*

v.

THE SANITARY DISTRICT OF HAMMOND, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the federal common law promulgated in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), continue to preempt the application of state law to interstate water pollution disputes now that the federal common law itself has been displaced by the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251, *et seq.*?

2. Does *Milwaukee I* hold that the States are *constitutionally* precluded from policing the pollution of their own boundary waters when the pollution emanates from another State? If so, should it be overruled?

3. Does the CWA itself preempt the application of state law to interstate water pollution disputes? If not, which State's choice-of-law rules govern the choice of the applicable law and which State's law applies?

4. If, as the Seventh Circuit held, Wisconsin law governs in the *Milwaukee* case and Indiana law governs in the *Hammond* case, should the Court of Appeals have applied Wisconsin law to the facts found at trial in *Milwaukee* and have directed the application of Indiana law on remand to the District Court in *Hammond* instead of remanding both cases for dismissal with prejudice?

5. May a sovereign State be compelled to seek redress for a trespass to its own land or a public nuisance occurring within its own territorial waters in the courts of another State?

PARTIES INVOLVED

The judgments of the Court of Appeals resolve two different cases—referred to herein as the *Milwaukee* case and the *Hammond* case—which were consolidated for argument.

The plaintiffs and petitioners in the *Milwaukee* case are the sovereign States of Illinois and Michigan. The defendants and respondents are the City of Milwaukee, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee—all municipal corporations.

The plaintiffs and petitioners in the *Hammond* case are the State of Illinois, and the Metropolitan Sanitary District of Greater Chicago, a municipal corporation. The defendants and respondents are the Sanitary District of Hammond and the City of Hammond, both municipal corporations, and the District's managers and trustees.

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PETITION

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit entered on March 27, 1984, App. at C-1, D-1, as clarified by the Court's order of May 29, 1984 denying rehearing, App. at B-1.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. § 1291 in the *Milwaukee* case and under 28 U.S.C. § 1292(b) in the *Hammond* case. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331(a) in both cases, with pendent jurisdiction being asserted over the state law claims. The *Hammond* case, which was filed in state court, was removed to federal court under 28 U.S.C. § 1441.

OPINIONS BELOW

The opinion of the Court of Appeals issued on March 27, 1984 is unreported and has been reproduced in the separately bound Appendices hereto at A-1. The Court's order of May 29, 1984, which denied the petitions for rehearing and modified the March 27, 1984 opinion, also is unreported and has been reproduced in the Appendices hereto at B-1. The Court's March 27, 1984 opinion and accompanying judgment orders, App. at C-1, D-1, address and resolve two separate cases which were consolidated for argument on appeal.

The *Milwaukee* case has been the subject of two prior opinions of this Court, *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), and *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"), as well as a prior opinion of the Court of Appeals, *People of the State of Illinois v. City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979) ("*Milwaukee (7th Cir.)*"), an unpublished, supplemental order of that Court scrutinizing the sufficiency of the evidence presented at trial, *People of the State of Illinois v. City of Milwaukee*, No. 77-2246 (7th Cir. Apr. 26, 1979), and several opinions and orders of the District Court—all of which have been reproduced in the Appendices hereto.

The opinion of the District Court in the *Hammond* case is reported at 519 F.Supp. 293 (N.D. Ill. 1981). It has been reproduced at F-1 of the Appendices hereto.

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Section 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Tenth Amendment:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are those of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251, *et seq.*, and the Illinois Environmental Protection Act, Ill.Rev.Stat. ch. 111½, § 1012(a), which have been reproduced in the Appendices hereto. App. at T-1, U-1.

STATEMENT OF THE CASES

Milwaukee

The *Milwaukee* litigation began when Illinois sought leave to file a complaint in the original jurisdiction of this Court after having spent five years trying to obtain relief pursuant to the Federal Water Pollution Control Act of 1956, Pub. L. No. 84-660. This Court denied Illinois leave to file its complaint. *Milwaukee I.* Though recognizing that the exercise of its original jurisdiction might be "mandatory" if the defendants could not be "sued by Illinois in a federal district court," and that an original action was an "appropriate vehicle for resolving this controversy," the Court exercised its discretion and remitted Illinois "to an appropriate district court whose powers are adequate to resolve the issues" under federal common law. *Milwaukee I*, 406 U.S. at 720, 726.

Illinois then filed suit in the United States District Court for the Northern District of Illinois. Count I charged the defendants with the creation of a public nuisance in the Illinois waters of Lake Michigan and

sought abatement thereof under federal common law. Counts II and III sought the same relief under the Illinois Environmental Protection Act, Ill.Rev.Stat. ch. 111½, §§ 1001, *et seq.*, and the common law of Illinois. The People of the State of Michigan intervened as plaintiffs, also alleging that defendants had created a public nuisance, abatement of which was sought under the common law of the United States and of Michigan.

After years of discovery and pre-trial proceedings wherein the defendants unsuccessfully sought dismissal for want of personal jurisdiction and improper venue, App. at R-1, and on the ground that the 1972 Amendments to the Federal Water Pollution Control Act had preempted the application of federal common law, App. at Q-1, a six-month trial was held. On August 30, 1977 the District Court entered its findings of fact and conclusions of law regarding liability. App. at P-1. The Court found for plaintiffs on all three counts of the Illinois complaint, after ruling that the defendants' discharges of untreated and inadequately treated sewage had created a public health hazard in the Illinois waters of Lake Michigan and was causing the premature eutrophication of the Lake. App. at P-6-24. The Court entered a final judgment order and injunction two months later, App. at N-1, based in part on a stipulation of the parties, App. at O-1.

The Court of Appeals affirmed in part and reversed in part the District Court's judgment. Having "carefully reviewed" the evidence, the Court concluded that it supported the District Court's finding of liability, whether tested under a "preponderance" or a "clear and convincing" standard. *People of the State of Illinois v. City of Milwaukee*, 599 F.2d 151, 167 (7th Cir. 1979). Indeed, in an unusual 38-page supplemental order scrutinizing the

evidence, the Court said the defendants could not even "seriously contend" that the evidence was insufficient to support the District Court's finding that defendants dump significant amounts of pathogen-containing sewage into Lake Michigan. *People of the State of Illinois v. City of Milwaukee*, No. 77-2246, at B-2 (7th Cir. Apr. 26, 1979), App. at K-2. The Court also concluded that, with certain exceptions, the injunctive relief granted to abate the nuisance was warranted. 599 F.2d at 169-77. The judgment of the Court of Appeals was founded solely on federal common law; the Court did not pass on the state law claims. 599 F.2d at 177 n.53.

This Court granted defendants' petition for *certiorari*, 445 U.S. 926 (1980), and ruled that the federal common law created by *Milwaukee I* had been displaced by the 1972 Amendments to the Federal Water Pollution Control Act. *Milwaukee II*. This Court then "vacated" the judgment of the Court of Appeals and remanded "the case" for further proceedings without addressing whether state law was available as a basis for relief. 451 U.S. at 310 n.4, 332. Three Justices dissented, observing that the "inevitable" effect of *Milwaukee II* was to "encourag[e] recourse to state law." 451 U.S. at 353 (*Blackmun*, Marshall & Stevens, JJ, dissenting). Three weeks later, the Court denied, without comment or dissent, the then-moot cross-petition that had been filed by Illinois, 451 U.S. at 982, which had sought reinstatement of the judgment entered by the District Court that was reinstated *instanter* when this Court vacated the judgment of the Court of Appeals. *See County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979); *Michling Barge Lines v. United States*, 368 U.S. 324, 329 n.11 (1961).

On remand, Illinois argued that the District Court's judgment could and should be affirmed on the basis of

either Illinois or Wisconsin law. *See* 33 U.S.C. §§ 1365(e), 1370. Defendants contended that *Milwaukee I* had held, as a federal constitutional matter, that *no* State's law could be applied.

The Court of Appeals reversed and remanded *Milwaukee* for dismissal. The Court reasoned that, in light of *Milwaukee I* and *II*, "federal law must govern" except to the extent that the CWA "authorizes resort to state law." App. at A-17. Construing Sections 505(e) and 510 of the CWA, 33 U.S.C. §§ 1365(e), 1370, as preserving the jurisdiction only of "the state in which the discharge occurs," App. at A-24, the Court reversed and remanded for *dismissal* ostensibly because the complaint filed in 1972 had sought relief under Illinois common and statutory law, which could not be applied, and not under the CWA or Wisconsin law. App. at A-24.

Illinois and Michigan petitioned for rehearing and rehearing *in banc*. They asserted that there was no basis for the "federal common law" choice-of-law rule the Court of Appeals had effectively created and reiterated their contention that they were entitled to relief under Wisconsin law even assuming, *arguendo*, that Illinois law could not be applied.

By a 4-3 vote, the Court of Appeals denied the petition on May 29, 1984. Two judges—whose votes could have altered the outcome—declined to participate. In its order of denial, the Court of Appeals noted and denied without explanation the petition's request that the judgment be modified to permit further proceedings on remand under Wisconsin law in lieu of dismissal. App. at B-3. It did not acknowledge the petition's request that the Court of Appeals itself apply Wisconsin law, if applicable. The Court's order also amended footnote 2 of its opinion so as to de-

lete its reference to "the choice of applicable law in interstate water pollution litigation within the United States," App. at A-16, and to make clear that nothing would preclude the application of Wisconsin law in a suit filed in a state or federal court located "in" Wisconsin. App. at B-3.

So, after fourteen years of litigation, Illinois and Michigan were left without a remedy for a wrong, not because they did not prove that the defendants had created a public health hazard in the Illinois waters of Lake Michigan and were eutrophying the Lake, App. at P-15, 23-24, but rather because of a pleading technicality contained in a complaint filed in 1972 under the aegis of *Milwaukee I*.

Every time a hard rain falls on Milwaukee, millions of gallons of untreated and inadequately treated sewage are flushed by the defendants from the Milwaukee sewers into Lake Michigan. That was true back in 1970 when Illinois first sought relief from this Court. It is still true today.

Hammond

During the summer of 1980, human fecal matter and industrial wastes began washing up on the shores of Chicago beaches. This caused a public health emergency in Illinois requiring the closing of Chicago beaches 21 times during that summer; tens of thousands of dollars in clean-up costs being incurred by Illinois municipalities; and hundreds of thousands of people being left without a place to sun bathe or to cool off. Ultimately, the source was located—the Hammond, Indiana "sanitary" sewer system.

Illinois and the MSD then jointly filed a five-count complaint in the Circuit Court of Cook County, Illinois which sought injunctive and other relief under the Illinois En-

vironmental Protection Act (Counts I and II), the federal common law of nuisance (Count III), the Illinois Public Nuisance Act (Count IV), and the Illinois common law of nuisance and trespass (Counts IV and V). The case was removed to the United States District Court for the Northern District of Illinois on the ground that the federal common law claim provided federal question jurisdiction and pendent jurisdiction existed over the state law claims.

After this Court's ruling in *Milwaukee II*, the defendants moved to dismiss the complaint, as well as a complaint filed by a private citizen in a related diversity case which had been consolidated for trial, on the ground that the complaints simply failed to state a claim for relief. The District Court agreed that the federal common law claim could not stand in light of *Milwaukee II* but declined to dismiss the pendent state law claims. *Scott v. City of Hammond*, 519 F.Supp. 293 (N.D. Ill. 1981). The Court reasoned that, since "there [now] is no separate [federal] common law but only federal statutory law, the [CWA] must be examined to determine whether Congress intended to make these pollution control matters solely a federal question." *Id.* at 298. Finding no Congressional intent to preempt the application of state law and "nothing in the Act [or] its legislative history that indicates a different result should be reached when considering an out-of-state polluter," the Court observed:

> "the only remaining determination is which state law applies. Hammond has never really disputed, and there can be no dispute, that Illinois choice of law rules apply and that they would determine Illinois to be the substantive law of the case." *Id.*

Noting, however, that questions of "first impression" were presented in the wake of *Milwaukee II*, the District Court certified its ruling for interlocutory appeal under 28

U.S.C. § 1292(b). App. at F-13-14. Timely application was made therefore and granted by the Court of Appeals, which consolidated the case with *Milwaukee*. App. at E-2.

On appeal, the District Court's interlocutory order denying the defendants' motion to dismiss for failure to state a claim to relief was reversed, and *Hammond* was remanded with express directions for *dismissal*. Notwithstanding plaintiffs' contentions that Indiana's *lex loci delicto* choice-of-law rule would dictate application of Illinois substantive law, and that plaintiffs were entitled to seek relief under Indiana substantive law in any event, the Court of Appeals denied rehearing by a 4-3 vote and declined to alter its judgment to permit further proceedings on remand under Indiana law.

Once again, a sovereign State was denied a remedy for a wrong, not because "it appears beyond doubt that the plaintiff [could] prove no set of facts in support of [its] claim which would entitle [it] to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), but rather because of a pleading technicality, easily cured on remand by amendment of the complaint, if necessary.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has misread *Milwaukee I*, misapprehended the effect of *Milwaukee II*, misconstrued Sections 505(e) and 510 of the CWA, 33 U.S.C. §§ 1365(e), 1370, and created a "federal common law" choice-of-law rule for interstate tort disputes that is in clear conflict with *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975), *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), and *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), as well as a host of this Court's decisions which make clear that no constitutional barrier to the application of Illinois law in these cases arises from the fact that the pollution crossed state lines. *E.g., Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308-09 & n.10, 312-13 & n.17, 317 & n.23 (1981); *Richards v. United States*, 369 U.S. 1, 15 (1962); *Young v. Masci*, 289 U.S. 253, 258-59 (1933); *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 156 (1932).

Moreover, even if the Court were correct in holding that only Wisconsin law can apply in *Milwaukee* and only Indiana law can apply in *Hammond*, the applicable law would be the *whole* law of Wisconsin and Indiana, *Richards v. United States*, 369 U.S. 1, 11 (1962), including choice-of-law rules which would dictate the application of Illinois substantive law. *E.g., Snow v. Byrne*, 449 N.E.2d 296, 298 (Ind. App. 1983) (*lex loci* rule governs); *Decker v. Fox River Tractor Co.*, 324 F.Supp. 1089, 1090-91 (E.D. Wisc. 1971) (Wisconsin uses five-factor test with a "false conflict" analysis and presumption in favor of the law of the forum). The Court's failure even to address the choice-of-law issue was clear error. *See Carboline Co. v. Home Indemnity Co.*, 522 F.2d 363, 368 (7th Cir. 1975).

And, even if the Court of Appeals were correct in holding that Illinois law could not be applied, the Court committed clear error in remanding *Milwaukee* and *Hammond* for dismissal with prejudice. If the law of Wisconsin governs in *Milwaukee*, the Court should have applied it to the facts found at trial or instructed the District Court to do so. *E.g., Colonial Refrigerated Transp., Inc. v. Worsham*, 705 F.2d 821, 825-28 (6th Cir. 1983); *Rohm and Haas Co. v. Adco Chem. Co.*, 689 F.2d 424, 428-29, 434 (3d Cir. 1982). The public nuisance proven at trial in *Milwaukee* was abatable under Wisconsin law, even if not under federal common law or Illinois law. *See, e.g., Milwaukee (7th Cir.)*, 599 F.2d at 163 & n.21; *Town of East Troy v. Soo Line R. Co.*, 653 F.2d 1123, 1128 (7th Cir. 1980) (applying Wisc. nuisance law), *cert. denied*, 450 U.S. 922 (1981). In *Hammond*, the proper disposition was to remand with instructions to apply Indiana law on remand, if applicable, not for dismissal with prejudice. *E.g., Foman v. Davis*, 371 U.S. 178, 181 (1962); *Conley v. Gibson*, 355 U.S. 41, 45-46, 48 (1957). The Court's judgments of dismissal amount to abrogation by judicial fiat of the "notice pleading" theory on which the Federal Rules of Civil Procedure are based.

Finally, insofar as the Court's judgments of dismissal are predicated on the notion that an action for abatement of a public nuisance under state law must be litigated in courts located "in" the State in which the discharges occurred, *see* App. at B-3, its judgments and opinion are in square confict with decisions of this Court which make clear that a sovereign State cannot be compelled to seek redress of its sovereign rights in the courts of another State. *E.g., Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493, 500 (1971); *Chisholm v. Georgia*, 2 Dall. 419, 475-76 (1793). In this respect the Court's opinion also conflicts with this

Court's prior rulings in *Milwaukee* itself that the District Court had personal jurisdiction over all parties and that venue was proper in the Northern District of Illinois. *Milwaukee II*, 451 U.S. at 312 n.5. *Ipso facto*, the District Court had power to grant the relief it did, under whichever State's law was applicable.

The questions presented by this petition will not go away. A nuisance is a nuisance is a nuisance. *Congress* having chosen *not* to preempt the application of state law as a *supplement* to the federal statutory scheme, 33 U.S.C. §§ 1365(e), 1370, the States will continue to seek redress of their quasi-sovereign ecological rights, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-39 (1907), either through original proceedings in this Court, 28 U.S.C. § 1251(a)(1), or in their own state courts, which may not be "persuaded" by the "logic" of any lower federal courts whose opinions they are not bound to follow. The decision of the Court of Appeals is in square conflict with opinions of the Illinois appellate courts permitting resort to state law remedies extrinsic to the federal statutory scheme against interstate, as well as intrastate, polluters. *E.g.*, *People ex rel. Scott v. United States Steel Corp.*, 40 Ill. App.3d 607, 352 N.E.2d 225 (1st Dist. 1976); *Metropolitan Sanitary District v. United States Steel Corp.*, 30 Ill. App.3d 360, 332 N.E.2d 426 (1st Dist.), *cert. denied*, 424 U.S. 976 (1975). This, alone, warrants a grant of *certiorari*. *See* Sup. Ct. R. 17(a).

I

AN OVERVIEW OF THE ANOMALIES CREATED BY THE OPINION OF THE COURT OF APPEALS

The opinion of the Court of Appeals raises some disturbing questions about the character of our federal system and the source of the laws which govern it. It is, of course, of the very essence of "Our Federalism," *Younger v. Harris*, 401 U.S. 37, 44 (1971), to have both federal and state sovereigns exercising *concurrent* jurisdiction over the same subject matter. And, sometimes, several States may exercise *concurrent* jurisdiction over the same subject matter; here, the same body of water. In a federal system of government, collision of state interests is unavoidable, and conflict of state laws is inevitable. How should the conflicts be resolved by a federal court?

For better or worse, this Court has ruled that there is no federal common law of interstate pollution. *Milwaukee II*. And, *Congress* has authorized resort to "any" State's law as a supplement to the CWA's statutory scheme. 33 U.S.C. §§ 1365(e), 1370. Some State's law thus governs the public nuisance and trespass claims extrinsic to the Act asserted herein.[1]

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[1] Though the Court of Appeals intimated that the CWA remedies are exclusive, App. at A-20 n.5, it was forced by the statutory text and its legislative history to conclude that both damages and injunctive relief are available at state law *in addition* to any relief obtainable under the Act. App. at A-21-22 & nn.6-7. *Accord, Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n.*, 453 U.S. 1, 16 n.26 (1981); *People of the State of Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 479 n.9 (7th Cir. 1982), *page citing with approval, Scott v. City of Hammond*, 519 F.Supp. 292, 298 (N.D. Ill. 1981); *U.S. Steel Corp. v. Train*, 556 F.2d 822, 830 (7th Cir. 1977); *Committee for Jones Fall Sewage System v. Train*, 539 F.2d 1006, 1009 & n.9 (4th Cir. 1976) (*in banc*).

When state law governs, the federal courts must follow the applicable state rules of decision. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). And, in determining which State's law applies, the federal courts must use the choice-of-law rules of the State in which the action is filed. *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975); *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

Notwithstanding *Milwaukee II* and *Day*, the Court of Appeals says the brooding omnipresence of federal common law is still with us. It has ruled as a matter of federal law[2] that, though Illinois could have invoked the common and statutory law of Wisconsin in *Milwaukee* and the common and statutory law of Indiana in *Hammond*, Illinois "cannot apply its *own state law* to out-of-state discharges." App. at A-16 (emphasis added). Why not? After all, those out-of-state discharges created a public nuisance *in* Illinois.

Milwaukee I does not hold that "Illinois law could not be used" *but Wisconsin law could be.* App. at 22-24. Moreover, Congress has authorized resort to "any" State's more stringent law as a *supplement* to the remedies available under the CWA. 33 U.S.C. §§ 1365(e), 1370. The governing choice-of-law rules would dictate application of Illinois law. *Scott v. City of Hammond*, 519 F.Supp. 293, 298 (N.D. Ill. 1981). And, there is no *constitutional* barrier to the application of Illinois law. The process of Illinois

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[2] Since there no longer is any substantive body of federal common law in the field of interstate water pollution, the Court's statement that "we think federal law must govern in this situation," App. at A-17, can only be interpreted as meaning that, notwithstanding the evisceration of federal common law by *Milwaukee II*, there remains a "federal common law" choice-of-law rule for interstate water pollution disputes. *Compare* App. at A-16 n.2, *with* App. at B-3.

courts has extraterritorial reach and gives them authority over out-of-state defendants, including municipalities of a sister State, or even a sister State itself. *Milwaukee II*, 451 U.S. at 312 n.5; *Nevada v. Hall*, 440 U.S. 410 (1979). And, "the potential conflict and confusion" that the Court of Appeals thought would result from the extraterritorial reach of Illinois law,[3] App. at A-22, is simply not a constitutional problem. *E.g., Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308-09 & n.10, 312-13 & n.17, 317 & n.23 (1981); *Nevada v. Hall*, 440 U.S. 410, 421-24 (1979); *Richards v. United States*, 369 U.S. 1, 15 (1962); *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 156 (1932); *In Re Air Crash Disaster Near Chicago*, 644 F.2d 594 (7th Cir. 1981), *cert. denied*, 454 U.S. 878 (1982).

Perhaps even more puzzling than the Court's creation of a "federal common law" choice-of-law rule for interstate water pollution disputes in the wake of *Milwaukee II* was the Court's studied refusal to apply the law that

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[3] The Court of Appeals appears to believe erroneously that no "activity occurr[ed] within the confines of [Illinois] boundary waters." App. at A-22. Where does the Court think the public nuisances and *trespasses* "occurr[ed]"? *Id.* Who does the Court of Appeals think paid to clean up the mess that closed Chicago beaches 21 times during the summer of 1980? *Chicago Park District v. Sanitary District of Hammond*, 530 F.Supp. 291 (N.D. Ill. 1981) (no damages available), *appeal pending*, No. 81-2896 (7th Cir.). In the eyes of the law, the defendants, through the agency of Lake Michigan, have "acted" *in* Illinois just as surely as if they had dumped their refuse from a plane flying over Illinois or had driven their garbage trucks into Illinois. *E.g., Young v. Masci*, 289 U.S. 253, 258-59 (1933) ("A person who sets in motion in one state the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument"); *The Salton Sea Cases*, 172 F. 792, 814 (9th Cir.), *cert. denied*, 215 U.S. 603, 606 (1909), quoting *Simpson v. State*, 92 Ga. 41, 17 S.E. 984, 985 (1893).

it had declared applicable.[4] If, as the Court of Appeals ruled, the law of Wisconsin governed in *Milwaukee* and the law of Indiana governed in *Hammond*, why did the Court not *apply* the law of Wisconsin to the facts found at trial in *Milwaukee*? *E.g., Colonial Refrigerated Transp., Inc. v. Worsham*, 705 F.2d 821, 825-28 (6th Cir. 1983); *Rohm and Haas Co. v. Adco Chem. Co.*, 689 F.2d 424, 428-29 (3d Cir. 1982). And, in lieu of remanding *Hammond* for dismissal, why did the Court not simply direct the application of Indiana law on remand? *E.g., Foman v. Davis*, 371 U.S. 178, 181 (1962). That the complaints had invoked the law of Illinois did not warrant their *dismissal* if another State's law applied. Invocation of the incorrect law or legal theory is not cause for dismissal of a complaint under the governing Federal Rules of Civil Procedure. Wright & Miller,

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[4] In its brief on remand and its petition for rehearing Illinois argued: (1) that Illinois choice-of-law rules and Illinois substantive law governed in *Milwaukee*; (2) that even Wisconsin choice-of-law rules would dictate application of Illinois substantive law; and (3) that, even if they did not, relief could and should be granted under the law of Wisconsin in any event. Thus, the refusal of the Court of Appeals even to respond to the arguments that Wisconsin choice-of-law rules would dictate application of Illinois substantive law, *see, e.g., Decker v. Fox River Tractor Co.*, 324 F.Supp. 1089, 1090-91 (E.D. Wisc. 1971), and that relief could and should be granted under the common and statutory law of Wisconsin in any event, *see, e.g., Town of East Troy v. Soo Line R. Co.*, 653 F.2d 1123 (7th Cir. 1980), *cert. denied*, 450 U.S. 922 (1981), could not have been an oversight.

In *Hammond*, the question of the applicable law was clear-cut because Indiana still uses a "*lex loci delicto*" approach to choice-of-law in tort cases that clearly would dictate the application of Illinois law. *E.g., Snow v. Byrne*, 449 N.E.2d 296, 298 (Ind. App. 1983); *Maroon v. State Dept. of Mental Health*, 411 N.E.2d 404 (Ind. App. 1980). And, given the procedural posture of *Hammond*, dismissal was out of the question. Given subject-matter jurisdiction over the case and personal jurisdiction over the parties, there is no reason why the District Court could not apply Indiana law, if applicable, on remand.

Federal Practice and Procedure § 1357, at 601-02. Indeed, Rule 8(a) does not even require a plaintiff to state the legal theory of his case or the governing law. *Moore's Federal Practice* ¶ 8.14; Wright & Miller, *Federal Practice and Procedure* § 1219. And, Rule 54(c) requires the court to grant a plaintiff the relief to which the applicable law entitles him on the basis of the facts pleaded and proved at trial even if the correct relief has not been sought, or has been sought under the wrong legal theory, or under the wrong State's law. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65-66 (1978); *Moore's Federal Practice* ¶ 54.62; Wright & Miller, *Federal Practice and Procedure* § 2664. The Court's judgments of dismissal simply cannot be harmonized with the "notice pleading" theory on which the Federal Rules of Civil Procedure are based.

It may be that the Court's judgments of dismissal were predicated on the notion that both it and the District Court were powerless to apply the governing state law because they were not located "in" the territory of the State whose law applied. *See* App. at B-3. This, of course, makes no sense. There is no "federal common law" venue rule for interstate tort disputes which requires Illinois to seek relief in courts located in Wisconsin and Indiana in contravention of the venue rules enacted by Congress. 28 U.S.C. § 1391. *But see* App. at B-3. Indeed, this Court already has ruled in *Milwaukee* that venue was proper in the Northern District of Illinois. *Milwaukee II*, 451 U.S. at 312 n.5. And, it may well have been "mandatory" for this Court to grant the original petition filed by Illinois, *Milwaukee I*, 406 U.S. at 98, if the Court's declination of original jurisdiction necessarily would have had the effect of compelling Illinois to seek relief in the courts of another State. *E.g., Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493, 500 (1971); *Chisholm v. Georgia*, 2 Dall. 419, 475-76 (1793).

II

THE COURT OF APPEALS HAS MISREAD *MILWAUKEE I* AND *II*, AND HAS MISCONSTRUED THE CWA

Milwaukee I

In *Milwaukee I* this Court said that "it is federal, not state, law that *in the end* controls the pollution of interstate or navigable waters." 406 U.S. at 102 (emphasis added). This teaching, which assumes that the States have inherent power to police the pollution of their boundary waters in the first instance, is consistent with long-standing Supremacy Clause principles used to resolve any conflicts created by the exercise of *concurrent* lawmaking powers. While it existed, federal common law may have governed to the exclusion of state law. But continuing reliance on *Milwaukee I* and its progeny is misplaced. The body of federal common law which may have preempted the application of state law no longer exists. *Milwaukee II*. And, if it no longer exists, it surely cannot preempt the application of *any* State's law.

There is no constitutional magic in the fact that pollution crosses state lines. This does not preclude the application of any interested State's law. *E.g., Young v. Masci*, 289 U.S. 253, 258 (1933). And, *Milwaukee I* certainly does not hold that, in the *absence* of a preemptive body of federal law, whether common or statutory, the States simply lack *power* to police the pollution of their boundary waters, whether the pollution is of interstate or intrastate origin.[5] If *Milwaukee I* were construed as so hold-

[5] If Illinois lacks *power* to police the pollution of interstate or navigable waters as a constitutional matter, so does Indiana and Wisconsin. *But see Milwaukee II*, 451 U.S. at 327-28; *People ex rel. Scott v. United States Steel Corp.*, 40 Ill.App.3d 607, 352 N.E.2d 225 (1st Dist. 1976); *Metropolitan Sanitary District v. United States Steel Corp.*,

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ing, *sub silentio*, it was wrongly decided and should be overruled. As this Court said in *Milwaukee II*, there never was any doubt that, prior to the creation of federal common law in *Milwaukee I*, "*state* common law control[led]" the interstate pollution of boundary waters.[6] 451 U.S. at 327 n.19 (emphasis in original). And, if federal common law no longer governs, there now is nothing to prevent the States from exercising their "historic police power" in this field unless it was "the clear and manifest purpose of Congress" to preempt state law in enacting the CWA. *Milwaukee II*, 451 U.S. at 316.

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[5] *continued*
30 Ill.App.3d 360, 332 N.E.2d 426 (1st Dist.), *cert. denied*, 424 U.S. 976 (1975). And, if no State has such power, what criminal sanctions are available if someone were to release toxic poisons into these waters that infect the drinking water supply of a State and cause the deaths of its citizens? Would Illinois, in a case in which its citizens and boundary waters were affected, be precluded from bringing homicide charges and seeking the death penalty against the culprits under "its own state law," App. at A-16, simply because the poisons were released from the shores of Wisconsin or Indiana? Or is the reach of its civil law not coextensive with the reach of its criminal law?

[6] In *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), this Court, citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), remitted Ohio to its own state courts with the observation that "an action such as this, if otherwise cognizable in federal district court [on the basis of diversity], would *have* to be adjudicated under state law." 401 U.S. at 498 n.3 (emphasis added). With the creation of a federal common law remedy "this statement," of course, had to be overruled. *Milwaukee II*, 451 U.S. at 327 n.19. Because federal question jurisdiction then could be invoked on the basis of a claim arising under federal law to which *Erie* was inapplicable, actions to abate an interstate nuisance no longer would "*have* to be adjudicated under state law." 401 U.S. at 498 n.3 (emphasis added). In overruling this particular statement, however, *Milwaukee I* does not impeach the teaching of *Wyandotte* and two centuries of American history that the States have inherent power to police the pollution of their boundary waters in the *absence* of a preemptive body of federal law.

It may be that the continued reliance placed on *Milwaukee I* by the Court of Appeals is premised on the unstated assumption that this Court has exercised some previously unknown constitutional power to effect an *irreversible* displacement of state law or somehow to erase state law out of existence simply by choosing to apply federal common law in lieu of the otherwise applicable state law. The Court says, for example, that there was no Illinois law for Congress to "save" because it had been preempted by *Milwaukee I*. App. at A-22. Such a view abandons almost two hundred years of American constitutional jurisprudence and, if adopted by this Court, would stand the basis of "Our Federalism" on its head. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

The national government is one of enumerated powers. The reserved lawmaking powers of the States, however, do not derive from, or depend for their existence upon, the Constitution of the United States. At least so far as that Constitution is concerned, they are inherent. U.S. Const. amend. X; *United States v. Darby*, 312 U.S. 100, 124 (1941). Moreover, the police power of the States is plenary in the scope of its reach excepting in areas "*exclusively* delegated" to the national government by the text of the Constitution. *Goldstein v. California*, 412 U.S. 546, 552-53 (1973) (emphasis in original), quoting A. Hamilton, *The Federalist* No. 32, at 241 (Wright ed. 1961). Even in areas in which the Constitution confers power on the national government, the police power of the States almost always coexists and may be exercised until the national government *not only* steps into the field *but also* affirmatively declares its "clear and manifest" purpose to preempt the concurrent exercise of state power. *Milwaukee II*, 451 U.S. at 316.

If a genuine conflict is created by the concurrent exercise of lawmaking power, the Supremacy Clause comes

into play and commands that federal law control. U.S. Const. Art. VI, § 2. Even then, however, the police power of the States to act in the field continues to *exist* because it does not derive from the Constitution of the United States in the first place. And, if and when a body of federal law governing the field is repealed or otherwise displaced, the disability that the Supremacy Clause imposes on the exercise of the inherent police power of the States dissipates. This is long settled constitutional doctrine. *E.g., Sturges v. Crowinshield,* 4 Wheat (17 U.S.) 122, 196 (1819).

If the inevitable effect of *Milwaukee I* is to preclude the application of *any* State's law even in the *absence* of federal common law and even though Congress has authorized resort to state law in the very statute which *Milwaukee II* says has displaced the federal common law, *Milwaukee I* must be overruled as inconsistent not only with the foundations of "Our Federalism," *Younger v. Harris,* 401 U.S. 37, 44 (1971), but also with separation of powers considerations dictating that Congress have the final say on the displacement of state law. 33 U.S.C. §§ 1365(e), 1370.

Milwaukee I no more bespeaks any State's lack of *power* to police the pollution of its boundary waters in the *absence* of federal common law than would Congress's decision to enact a statute in a sphere previously subject only to state regulation. To be sure, when federal law is promulgated, it may have constitutional consequences under the Supremacy Clause. It does not follow, however, that the promulgation of federal law is based on a State's lack of power to regulate the subject matter in the first place, or that such power cannot again be exercised once any superseding body of federal law has been displaced.

Whatever preemptive effect *Milwaukee I* had on Illinois law, it had the same effect on Wisconsin and Indiana

law. And whatever preemptive effect *Milwaukee I* had on state law generally, its preemptive effect dissipated upon the demise of federal common law in *Milwaukee II*. So now, unless the CWA itself preempts the application of *all* state law as a supplement to the federal statutory scheme, *no* State can be disabled from policing the pollution of its boundary waters.

Milwaukee II

Milwaukee II teaches that this Court must now look to the statute which preempted the federal common law, not to *Milwaukee I*, to determine whether any State is preempted from exercising its inherent power to police the pollution of its boundary waters. As the Supreme Court emphasized in *Milwaukee II*,

> "[t]he enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully isolated from democratic pressures, but by the people through their elected representatives in Congress." 451 U.S. at 312-13.

Throughout *Milwaukee II* the Court emphasized its decision was based *solely* on considerations respecting the separation of powers between the legislative and judicial branches of the national government. The quite *different* considerations respecting the division of powers between the national government and the States did not come into play. 451 U.S. at 316-17 & n.9. Though the Court concluded that the statute had occupied the field to the exclusion of judicially created federal law, the Court also went out of its way carefully to emphasize that "the comprehensive character of a federal statute" is "an insufficient basis to find pre-emption of state law" and, indeed, is not even "relevant" to the question whether state law

can be concurrently applied. *Compare id.* at 319 n.14, *with* App. at A-18 ("comprehensive").

Because *Milwaukee II* makes plain that Congress has the last word on the displacement of state law, the question whether the historic power of any State to police the pollution of its boundary waters has been preempted now turns on whether Congress indicated a "clear and manifest" purpose to preempt it. 451 U.S. at 316. Congress had no such purpose or intent. Indeed, it expressly authorized and encouraged resort to "any" State's law as a supplement to the CWA's administrative scheme. 33 U.S.C. §§ 1365(e), 1370.

The CWA

This Court will search the CWA in vain for affirmative evidence of a clear and manifest intent to preempt any State's historic power to police the pollution of its boundary waters. And, the assumption mandated by *Milwaukee II* as the "start[ing]" point for preemption analysis would be rendered meaningless if the mere existence of a federal administrative remedy, whether adequate or not, were construed as affirmative evidence of a "clear and manifest" purpose to preempt concurrent state law remedies. 451 U.S. at 316; *cf. Monroe v. Pape*, 365 U.S. 167, 183 (1961).

The opinion of the Court of Appeals concedes, as it must, that Illinois may apply its own law to intrastate polluters of Lake Michigan and other interstate waters, and that the administrative and other remedies available against intrastate polluters under the CWA do *not* preclude resort to other state law remedies. App. at A-21-22 & nn. 6-7; *People of the State of Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 479 n.9 (7th Cir. 1982). The *text* of the statute does not even support, let alone compel, the anomalous conclusion that *Congress* intended

to preempt resort to Illinois state law remedies against interstate polluters but not against intrastate polluters, or that *Congress* intended to preempt the application of Illinois law, but not Wisconsin or Indiana law, in the circumstances of these cases. When *Congress* intended to preempt *any* State's law it declared its intent in "clear and manifest" terms. *Milwaukee II*, 451 U.S. at 316. *E.g.*, 33 U.S.C. § 1322(f)(1) ("no State . . . shall"). There is no comparable language of preemption in § 402 or in any other of the statutory provisions referenced by the Court of Appeals. *See* App. at A-18-20. Indeed, *Congress* affirmatively authorized the adoption and enforcement of "any" State's more stringent law in § 510. *Congress* chose diversity, not uniformity:

> "Except as *expressly* provided in this Act, *nothing* in this Act shall (1) preclude or deny the right of *any* State or political subdivision thereof or interstate agency to *adopt or enforce* (A) *any* standard or limitation respecting discharges of pollutants, or (B) *any* requirement respecting control or abatement of pollution; *except* that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is *less stringent* than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in *any* manner affecting *any* right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370 (emphasis added).

The Court of Appeals reads § 510 as preserving the right of the States to adopt more stringent regulations only for discharges occurring within their boundaries. App.

at A-21-22. This strained, result-oriented "construction" is refuted by the plain language of § 510. In § 510(1) Congress authorized adoption and enforcement of the "any" State's more stringent standards. 33 U.S.C. § 1370(1). In § 510(2) Congress made explicit that "nothing" in the Act, *including* the discharge-permit process established by § 402,[7]

[7] The observation of the Court of Appeals that the permit issuing process established by § 402 "seems now to be the appropriate *federal* forum for adjusting the competing claims of states in the environmental quality of interstate waters," App. at A-20 n.5 (emphasis added), is based on a fundamental misapprehension of the statutory scheme. In administering permit programs pursuant to § 402, the States are acting in their own right and under color of their own law, not as "agents" of the federal government or the EPA. *Mianus River Pres. Comm. v. Administrator*, 541 F.2d 899, 906 (2d Cir. 1976). The permits they issue are *not* "federal" permits in any sense of the word, and the state administrative agencies which issue the permits are *not* "federal" forums in any sense of the word. *Id.* at 905 ("permits granted by States under section 402 are not Federal permits"), quoting H.R. Rep. No. 92-911. Though the Administrator of the EPA has *discretion* to review any permit issued by any State, nothing in the Act *requires* him to do so; he may *waive* his right to do so; and his failure to object to or veto a State-issued permit is not even an "action" of the Administrator reviewable in any federal court. *Id.* at 906-10. Indeed, as the Court of Appeals itself has observed, it is not even clear whether the Administrator of the EPA has authority to veto a permit at the behest of an objecting State as long as the permit is adequate to ensure compliance with the water quality standards set by the issuing State. 599 F.2d at 160.

Even if Illinois were to participate in the permit-issuing process of Wisconsin, it would be unable to challenge the Wisconsin-created water quality standards on which the permits are based. The reason that the *Milwaukee* permits are inadequate is that the Wisconsin-created *water quality* standards which are *immune from attack* in the permit proceedings are themselves inadequate. *E.g.*, *United States Steel Corp. v. Train*, 556 F.2d 822, 835-39 (7th Cir. 1977). For this and other reasons, the so-called "remedies" available under the CWA to a State whose waters are adversely affected by permits issued by another State are illusory. *See also District of Columbia v. Schramm*, 631 F.2d 854, 859-62 (D.C. Cir. 1980), discussing 33 U.S.C. §§ 1342(d)(3),(e), 1369(b)(1)(f). Indeed, it is ironic that, though Milwaukee could obtain federal court review

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was to be "construed" as impairing the "jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370(2). *Congress* used the plural, "States," not the singular. *Id.* Jurisdiction is, by definition, *power*. The state jurisdiction preserved is over *waters*, not discharges. Boundary waters are, by definition, *interstate* waters. It's *our* Lake, the "boundary waters" of *several* "such States." The *text* simply defies the meaning the Court of Appeals forces on it.

The only possible meaning of § 510 is that, although Congress did not declare *which* State's law would apply in the context of the interstate pollution of "boundary waters," 33 U.S.C. § 1370(2), a choice-of-law question traditionally left to the judiciary which now must be resolved by reference to *state* law, Congress intended to authorize all the States to police the pollution of their boundary waters[8] except when Congress expressly provided otherwise in the Act, as in § 312(f)(1), 33 U.S.C. § 1322(f)(1) ("no State . . . shall"). No other meaning can be ascribed to § 510(2) if the statute is to be construed in light of

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[7] *continued*
of the Administrator's veto of a Wisconsin permit, Illinois could not obtain federal court review of his refusal to veto a permit. *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 197 n.9 (1980).

But, whether the so-called "federal forum" provided by § 402 of the CWA is adequate or not, App. at A-20 n.5, is immaterial. *Congress*, which understood the gaps in its "comprehensive" scheme, *id.* at 18, and chose not to leave the quasi-sovereign ecological rights of the States to the unreviewable discretion of state and federal bureaucrats, has authorized resort to *state* nuisance law as a *supplement* thereto. *Middlesex County Sewerage Authority v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 n.26 (1981). That's what makes the scheme *truly* "comprehensive." App. at A-18.

[8] The legislative history of § 510(2), as well as the text, defies the notion that Congress intended to preempt any State's police power over its boundary waters. *See, e.g.*, Proposed Amendments to the Water Pollution Control Act: Hearings on S. 890 and S. 928 Before a Subcomm. of the Senate Comm. on Public Works, 85th Cong., 1st Sess. 48 (April 22, 1955).

its underlying policies, one of which is "to recognize, preserve, and protect the primary responsibilities and rights of *States* to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b) (emphasis added).

Section 510 does not stand alone in authorizing resort to *any* State's concurrent law. Section 505(e) makes explicit that the remedies available under § 505 do not preempt resort to "*any* other relief" available under "*any* statute or common law." 33 U.S.C. § 1365(e) (emphasis added). As this Court has recognized, one purpose of § 505(e) was to preserve the right to damages at state law, and Congress said that compliance with the requirements under the Act would *not* be a defense to a common law action. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 n.26 (1981).

It makes no textual sense to say, as the Court of Appeals has ruled, that Illinois or its citizens can obtain damages or injunctive relief extrinsic to the CWA under Wisconsin or Indiana law, but not under Illinois law.[9] As the text and legislative history of § 505(e) and § 510 make clear, Congress did not distinguish between Illinois law and Wisconsin or Indiana law, or between the state law applicable to intrastate polluters and the state law applicable to interstate polluters, when it affirmatively authorized resort to *any and all* state law excepting that "expressly" preempted by the Act. 33 U.S.C. §§ 1365(e),

[9] The strained construction placed on Sections 505(e) and 510 by the Court of Appeals was motivated principally, if not solely, by *policy* considerations. The Court obviously was concerned over the plight of polluters who might be forced to meet standards more stringent than those embodied in their state-issued permits. *See* App. at A-22-23. The purpose of the Act, however, is not to immunize the polluters of our waters. 33 U.S.C. § 1251(a)(1). The Act was not created for the benefit and protection of polluters, but rather for the benefit and protection of their victims. The Court of Appeals has simply substituted its policy judgment for Congress's. 33 U.S.C. § 1370.

1370. When Congress preempts state law, it preempts *any* State's law. *E.g.*, 33 U.S.C. § 1322(f)(1) ("no State"). Likewise, when Congress "save[s]" state law, App. at A-22, it does not *discriminate* among the laws of the several States. It does not preempt the application of one State's law, while simultaneously "sav[ing]" the application of another State's law. App. at A-22. The very existence and terms of § 505(e) and § 510 contradict the inference of any Congressional intent to preempt resort to *any* State's law in this case. *Which* State's law applies is now a choice-of-law matter governed by the same rules applicable in any interstate tort action in which state law governs.

CONCLUSION

The Court should grant the petition for *certiorari.*

Respectfully submitted,

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